

Decision 04-11-036

November 19, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
Altrio Communications, Inc. for a
Certificate of Public Convenience and
Necessity to Operate as Provider of
Facilities-Based and Resale Local
Exchange and Interexchange
Telecommunications Service Within
the State of California.

Application 00-10-044
(Filed October 20, 2000)

ORDER DISMISSING APPLICATION FOR REHEARING OF
DECISION 03-11-016

I. SUMMARY

This decision addresses the application for rehearing of Decision (D.) 03-11-016, filed by the Pasadena Neighborhood Coalition (Coalition). We find that the Coalition lacks standing to file an application for rehearing, and accordingly dismiss its application.

II. BACKGROUND

In D.03-11-016, we approved the amended application of Altrio Communications, Inc. (Altrio) for a full facilities-based certificate of public convenience and necessity (CPCN) as a competitive local exchange carrier to offer service within the territory of the City of Pasadena.

Altrio applied for a CPCN in October, 2000, but amended its application in May, 2001, asking the Commission to consider its application in two steps. Altrio first asked for a limited facilities-based CPCN (LFB CPCN) and resale authority to operate as a

competitive local carrier (CLC) within the greater Los Angeles metropolitan area, and as a nondominant interexchange carrier (NDIEC) statewide. At a later time, Altrio was to file a Proponent's Environmental Assessment (PEA) and ask for full facilities-based authority to operate as a CLC within the entire local exchange operating territories of the state's four non-rural incumbent local exchange carriers, and as an NDIEC statewide. Altrio requested that the LFB CPCN include authority for various construction components, including:

1. Pulling fiber-optic and coaxial cable through existing utility conduit, attaching fiber-optic and coaxial cable to existing utility poles, and installing distribution nodes and optical-electrical interfaces;
2. Installing backup electric generators within existing utility easements; and
3. Installing approximately 1.2 miles of new utility conduit within existing rights-of-way.

We granted Altrio an LFB CPCN in July, 2001 (*see* D.01-07-022), but did not include the listed construction activities. Instead, Altrio was allowed to utilize equipment installed solely within existing buildings or structures. We deferred consideration of the construction components to a later decision, once Altrio submitted its PEA in compliance with the California Environmental Quality Act (CEQA), Pub. Res. Code §§ 21000 *et seq.*

In the meantime, however, Altrio was certified by the Federal Communications Commission (FCC) to operate an open video system (OVS) in Los Angeles, Ventura, and Orange counties in November 2000. OVS is similar to cable television; however, in addition to a cable television system, Altrio's network is a broadband service capable of delivering cable video, cable modem, and telephone services simultaneously. In December, 2000, Altrio applied for a franchise to operate as an OVS provider in the City of Pasadena. In August, 2001, Pasadena executed a franchise agreement with Altrio and granted rights to construct and operate an OVS in Pasadena. In doing so, Pasadena found that Altrio was exempt from the requirements of CEQA.

Altrio began constructing its OVS network in October 2001, which extended from Altrio's offices and headend in Los Angeles, to Altrio's hub and node facilities Pasadena. From its headend, Altrio pulled both fiber-optic cable and coaxial cable through existing utility conduits within the office park where Altrio's offices are located. It also attached fiber cable to existing utility poles between its headend and the first of two planned hubs in Pasadena. From the hubs, Altrio has fiber cable, both strung on existing utility poles and underground, running to Altrio's distribution nodes. Associated with each node is a cabinet containing a battery and generator, used as backup power sources. In November, 2002, the Pasadena Neighborhood Coalition filed a complaint before the Commission alleging that Altrio's construction activities violated the terms of its LFB CPCN. (*See* C.02-11-053.)¹

Altrio filed an amendment to its CPCN application on September 8, 2003, in which it sought to withdraw its earlier request for full facilities-based authority for all parts of California, except where it has built or will build its OVS network pursuant to agreements or cable franchises granted with specific local jurisdictions, namely the city of Pasadena.

We noted that no construction of additional facilities for telecommunications services was contemplated other than that authorized by Pasadena as part of the OVS network. Although we expressed concern with the validity of Pasadena's CEQA exemption, we found no useful purpose would be served by denying Altrio's request for a full facilities-based authority within the City of Pasadena. We accordingly accepted Pasadena's CEQA exemption determination and granted Altrio's amended application in D.03-11-016.

The Pasadena Neighborhood Coalition filed an application for rehearing of D.03-11-016 on December 15, 2003.

¹ That proceeding resulted in D.03-12-064, which found that Altrio violated the terms of its LFB CPCN. The Coalition filed an application for rehearing of that decision, as well.

III. DISCUSSION

A. **The Pasadena Neighborhood Coalition Lacks Standing to File an Application for Rehearing of D.03-11-016**

The Coalition does not have standing to file the instant application for rehearing. It is settled in California that the right to appeal is purely statutory, and that one who does not have standing may not appeal a judgment or order. The question of standing is also wholly controlled by statute. (*Rao v. Campo* (1997) 233 Cal. App.3rd 1557; 4 Cal. Jur. 3rd 183, 193.) In the case of this Commission, the question of standing to request rehearing of an order is specifically governed by Public Utilities Code section 1731(b) which provides, in part:

"(b) After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing ..."

The Coalition was not a party to this proceeding, nor is it a shareholder or bondholder or pecuniarily interested in any entity which was a party. It therefore lacks standing to apply for rehearing of the Decision. (*Lang v. Railroad Comm'n of Cal.* (1932) 2 Cal.2d 550; *Glenn-Colusa Irr. Dist. v. Paulson* (1926) 75 Cal. App. 57.) The Coalition had the opportunity to intervene as a party on a timely basis, but did not do so. It cannot be said that the Coalition was unaware of this proceeding, as an earlier decision from this proceeding (D.01-07-022) was the basis of the Coalition's complaint filed against Altrio. As the

Coalition lacks standing, its application for rehearing should be dismissed.²

B. Even if the Coalition Had Standing, the Application for Rehearing Is Without Merit

The Coalition argues that the Commission's grant of full facilities-based authority to Altrio violates the Commission's CEQA obligations. According to the Coalition, the Commission's Rules of Practice and Procedure require applicants to file a PEA prior to commencing any project subject to CEQA, and that the Commission must review the PEA and prepare an Initial Study to determine whether to prepare a Negative Declaration or an Environmental Impact Report. Rule 17.1. The Coalition argues that the Commission violated this rule. What the Coalition fails to come to terms with, however, is the fact that the relevant facilities were already built, or were going to be built, as part of Altrio's OVS network in order to provide cable television and high-speed data transmission services, services not under the jurisdiction of the Commission. The focus of any CEQA inquiry relates to Altrio's OVS network, which was the subject of an exemption from the City of Pasadena. The Commission never had and does not have any authority to prevent the construction of these facilities. No additional construction was contemplated for the provision of telecommunications services, and thus there was no construction "project" over which the Commission was to exercise a CEQA review.

² The Commission has rejected similar attempts by non-parties to file applications for rehearing. In *Application of Wild Goose Storage, Inc. for a CPCN* (1997), D.97-10-070, 1997 Cal. PUC LEXIS 975, the Commission found that Roseville Land Development Land Association lacked standing to file an application for rehearing because, although the company had participated in the environmental review of the project, it had never made an appearance as a party. The Commission denied the application for rehearing, quoting Section 1731, and noting that the company had had the opportunity to intervene as a party on a timely basis, but had not done so. Similarly, in *Application of AT&T Communications of California to Increase Rates* (1988), D.88-08-066, 29 Cal. P.U.C. 2d 177, the Commission rejected an application for rehearing by Extelcom as improper because Extelcom was not a party to the action and lacked the financial interest in AT&T required by Section 1731(b). The Commission reiterated that only those persons or entities described in Section 1731(b) may file rehearing.

The Commission was faced with a request to use facilities that had already been found exempt from CEQA review by Pasadena and placed in service for purposes other than providing telecommunications services. We had the discretion to accept or reject the exemption granted by Pasadena, and the discretion to either grant or deny the request of Altrio to extend its previously granted LFB authority to full facilities-based authority. Under 14 Cal. Code Reg. Section 15042, we can disapprove of a project approved by the lead agency, but in this case, because we do not have jurisdiction over cable and high-speed data transmission services, that disapproval would only extend to the provision of telephone services. The facilities would continue in operation irrespective of how the Commission resolved the request for telecommunications authority. Given these circumstances, the fact that no protest was filed to Altrio's application, and given our policy of developing competitive telecommunications choices to consumers, we granted Altrio full facilities-based authority within the boundaries of the City of Pasadena, and limited to the scope of the OVS facilities authorized by Pasadena. The Coalition fails to demonstrate that the Commission abused its exercise of discretion, or otherwise violated the law in granting this authority.

The Coalition argues that the Commission must still exercise its independent judgment on the environmental issues, and that the Commission is obligated to conduct an environmental review since the City of Pasadena did not conduct an environmental review. The Coalition also argues that the Commission must take over as "lead agency" because Pasadena did not issue any environmental documentation. The Coalition mischaracterizes the actions of the City of Pasadena. Pasadena did not fail to engage in an environmental review or issue any documentation. The City of Pasadena granted a Class I exemption. As explained above, although the Commission expressed concerns whether the exemption was properly granted, the Commission did exercise its independent judgment as to whether to accept this exemption for the limited purposes of

determining whether to grant Altrio full facilities-based authority for telecommunications services.

The Coalition next argues that it was improper for the Commission to accept the exemption granted by the City of Pasadena. The Coalition argues that it presented substantial evidence in the Coalition's complaint case in C.02-11-053 demonstrating that Pasadena's CEQA exemption was not proper. There are two main problems with this argument. The first is that none of this evidence was submitted into the record in this proceeding. As the Commission noted in the Decision, there were no protests filed to Altrio's application, and no reasons were offered as to why Altrio's request should not be granted. Furthermore, while the Commission had the discretion to accept or reject Pasadena's exemption for purposes of evaluating Altrio's request to provide telecommunications services, it had no authority to invalidate Pasadena's exemption or disapprove of the project to construct Altrio's OVS network, which was built to provide cable and high-speed data transmissions. (As the Commission noted in D.03-12-064, the validity of Pasadena's exemption was being litigated in Los Angeles Superior Court (*Kneisel v. City of Pasadena*, No. BS079863).)

Next, the Coalition claims that the Commission deviated from its own precedent requiring environmental review for already-constructed facilities. The Coalition points to D.02-08-063, in which we issued a stop work order and required review of both constructed and unconstructed portions of a fiber optic network being built by Pacific Fiber Link. In that case, we conducted our own environmental review even though PFL had obtained a CEQA exemption for at least some of the construction from Yolo county. The two cases are not analogous. In D.02-08-063, PFL was constructing a fiber optic network for the purposes of providing telecommunications services, rather than services not under the Commission's regulatory control. Although some construction was completed, the project was by no means finished at the point we stepped in to

conduct an environmental review. The differing factual circumstances do not demonstrate that we deviated from our own precedent.

Finally, the Coalition complains that the issuance of D.03-12-064 violated the Coalition's due process rights because it had a substantive effect on its complaint proceeding. However, the Coalition makes no showing that the outcome in one case prejudged the outcome in the other. Nor does the Coalition support its allegation that Altrio's *ex parte* communications in A.00-10-044, which were not prohibited and were properly reported, improperly influenced the outcome in C.02-11-053. The Coalition's due process claims rest purely on speculation, and are without merit.

IV. CONCLUSION

We find that the Pasadena Neighborhood Coalition lacks standing to file an application for rehearing of Decision 03-11-016.

IT IS THEREFORE ORDERED that:

1. The Pasadena Neighborhood Coalition's application for rehearing of Decision 03-11-016 is dismissed.
2. This proceeding is closed.

This order is effective today.

Dated November 19, 2004 at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners